

225 CMR 10.00

225 CMR 10.00: ENERGY MANAGEMENT SERVICES (EMS) CONTRACTS

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10.01: Application, Purpose, and Authority

(1) Application. 225 CMR 10.00 shall apply to the procurement of energy management services pursuant to M.G.L. c.25A, §11C by a governmental body or a public agency, as specified. Services that are primarily intended to reduce operational and maintenance costs, including but not limited to personnel costs, shall not be procured under 225 CMR 10.00. Any dispute as to inclusion or exclusion within the provisions of 225 CMR 10.00 shall be determined by the Division of Energy Resources.

(2) Authority. 225 CMR 10.00 is promulgated under the direction of M.G.L. c.25A, §11C.

10.02: Definitions

Terms defined in M.G.L. c.25A, §§ 3 and 11C, which are also used in 225 CMR 10.00, shall have the same meaning as set forth in M.G.L. c.25A, unless said term is otherwise defined in 225 CMR 10.00.

Certificate of Eligibility. A certificate provided by DCPO pursuant to M.G.L. c. 149, § 44D, indicating a contractor's qualifications to perform energy management services (EMS), and any update statements issued by DCPO.

DCPO. Division of Capital Planning and Operations, established by M.G.L. c. 4, § 7A.

DHCD. Department of Housing and Community Development.

DOER. The Division of Energy Resources, established by M.G.L. c.25A, §1.

10.02 continued

Energy Audit. A determination of the energy consumption characteristics of a building or facility which identifies the type, size, and rate of energy consumption of the building or facility and the major energy systems of the building or facility; determines appropriate energy conservation maintenance and operating procedures; and indicates the need, if any, for the acquisition and installation of energy conservation measures.

Energy Conservation Project. A project to promote energy and water conservation, including but not limited to energy conserving modification to windows and doors; caulking and weather-stripping; insulation; automatic energy control systems; hot water systems; equipment required to operate steam, hydraulic, and ventilating systems; plant and distribution system modifications including replacement of burners, furnaces, or boilers; devices for modifying fuel openings; electrical or mechanical furnace ignition systems; utility plant system conversions; replacement or modification of lighting fixtures; energy recovery systems; and cogeneration systems.

Governmental Body. A city, town, district, regional school district, county, or agency, board, commission, authority, including but not limited to housing authorities whether funded by state or federal funds, department or instrumentality of a city, town, district, regional school district or county, and all other public agencies which are not a state agency or building authority.

Lease. A financing mechanism included in a legally binding and enforceable agreement which enables a governmental body to use and, if applicable, purchase and own, by means of installment payments, equipment for the implementation of energy management services.

Local housing authority. A body politic and corporate created pursuant to M.G.L. c.121B or similar provisions of earlier general or special laws.

Public Agency. A department, agency, board, commission, authority, including but not limited to housing authorities whether funded by state or federal funds, or other instrumentality of the Commonwealth or political subdivision of the Commonwealth or two or more subdivisions thereof, including, but not limited to, governmental bodies, state agencies and building authorities.

RFR. A request for responses, which is referred to in M.G.L. c.25A, §11C as a “request for proposals”, consisting of a written document issued by a public agency which invites bidders to submit responses outlining their qualifications, the desire to perform the energy management services for the public agency, a cost proposal, and other information required by 225 CMR 10.03(1) and the public agency.

RFR Compliance Certification. A certification form issued and revised from time to time by the Commissioner of DOER, which is completed and signed by a governmental body and filed with DOER, certifying in writing that the governmental body’s RFR for EMS is in full compliance with 225 CMR 10.00 and M.G.L. c.25A, §11C.

10.02 continued

Total Project Price. The total payments made by a governmental body to a contractor for energy management services, including but not limited to, the total capital investment, the contractor's return on investment, utility sponsored rebates, tax or other incentives, any direct governmental subsidies, interest payments, and energy and water cost savings.

10.03: Request For Responses; Responses

- (1) RFR Terms. A governmental body shall solicit competitive sealed responses through an RFR, which shall at a minimum include, in addition to the requirements of M.G.L. c.25A, §11C, the following:
- (a) a general description of those buildings to be addressed by the RFR, including where applicable:
 - 1. the general purpose for which the building is used, and approximate hours of daily occupancy;
 - 2. the approximate size, age and condition of the building envelope;
 - 3. a general description of the heating and cooling systems including the approximate age, condition, and fuel type(s);
 - 4. a general description of the heating and cooling distribution systems and control systems;
 - 5. a general description of the lighting and lighting control systems; and
 - 6. fuel, electricity, and water consumption data for the past three years (if applicable).
 - (b) a general statement of the minimum scope of building improvements requested by the governmental body;
 - (c) a request that the bidder provide recommendations to address building improvements referenced in 225 CMR 10.03(1)(b), and where applicable, to additional improvements for:
 - 1. the building envelope;
 - 2. the heating and cooling systems (if applicable);
 - 3. the lighting and control systems; and
 - 4. any other recommendations for energy savings sought by the governmental body;
 - (d) a statement of objectives, identifying the project's priorities on which responses will be evaluated, which may include saving energy and water costs, reducing consumption, funding major capital improvements, and improving building operating conditions;
 - (e) a request for estimated energy and water cost savings based on the specified savings calculation methodology;
 - (f) a request for price data on each proposed energy and, if applicable, water conservation measure;
 - (g) mandatory business specifications, including a DCPO Certificate of Eligibility and Update Statement; and
 - (h) minimum contract and payment terms, including, but not limited to, any related utility and water savings and revenues which are factored in said payments, payments to the contractor and payments to the governmental body.

10.03: continued

(2) Filing of RFR with DOER. Public agencies procuring EMS under 225 CMR 10.00 are required to file a copy of the RFR, along with other information, in a Notice of EMS Procurement, in accordance with the procedures established in 225 CMR 10.03, except that state agencies and building authorities shall only be required to file a copy of the RFR. Local housing authorities shall also file the RFR, prior to publication, with DHCD. A governmental body may choose to either:

- (a) obtain DOER's review of and comments on the RFR, as provided in 225 CMR 10.03(3) through (5); or
- (b) forego DOER's review, as provided in 225 CMR 10.03(6).

Governmental bodies requesting DOER's review and comments on an RFR must file a Notice of EMS Procurement at least 35 business days prior to publishing the RFR.

Governmental bodies foregoing DOER's review and comments on an RFR must file a Notice of EMS Procurement at least seven days prior to publishing the RFR.

Governmental bodies are strongly encouraged to obtain DOER's review of an RFR.

(3) Notice of EMS Procurement to DOER. Governmental bodies filing an RFR with DOER shall file the RFR in a Notice of EMS Procurement which shall:

- (a) include a copy of the RFR;
- (b) identify the public agency procuring EMS, including the name, address, telephone and fax number, and title of the person responsible for said procurement;
- (c) identify the name(s) and building address(es) where EMS will be performed for the public agency;
- (d) be labeled as "Notice of EMS Procurement" and delivered by the public agency to the Commissioner of DOER by certified mail, return receipt requested; and
- (e) include a completed RFR Compliance Certification form, certifying that the governmental body's RFR fully meets the RFR requirements of 225 CMR 10.00 and M.G.L. c.25A, §11C.

(4) Acknowledgment of Receipt.

- (a) Within two business days of DOER's receipt of:
 - 1. a Notice of EMS Procurement;
 - 2. a copy of an RFR, as applicable, DOER shall mail to the public agency, by certified mail, return receipt requested, an Acknowledgment of Receipt of the documents. An Acknowledgment of Receipt is not an indication of DOER's review or approval of an RFR.
- (b) If the filing is incomplete, DOER shall identify the documents or information necessary to complete the filing. A governmental body shall refrain from publishing an

RFR until the governmental body receives an Acknowledgment of Receipt from DOER confirming a complete filing.

(5) Request for DOER's review of an RFR. A governmental body may request DOER's review of and comments on an RFR by indicating said request to the Commissioner of DOER in the governmental body's RFR Compliance Certificate form in the Notice of EMS Procurement. In such cases, the Notice of EMS Procurement, including the RFR Compliance Certificate, must be filed with DOER at least 35 business days prior to publishing the RFR.

10.03: continued

DOER shall not review or comment on any RFR unless the request complies with the requirements of 225 CMR 10.03(5). Governmental bodies are strongly encouraged to incorporate DOER's comments into the RFR prior to publication to mitigate the likelihood of potential disputes. However, if a governmental body has received an Acknowledgment of Receipt from DOER indicating that the Notice of EMS Procurement is complete, the governmental body may publish the RFR. DOER's review of an RFR shall be limited to the requirements of 225 CMR 10.00 and M.G.L. c.25A, §11C relating to RFR terms. DOER's review of and comments on an RFR shall not concern or endorse any technical or financial information included in the RFR. Within 25 business days after DOER receives a complete Notice of EMS Procurement requesting DOER's review, DOER shall deliver to the governmental body, by certified mail, return receipt requested, a letter providing DOER's comments on the RFR.

(6) Foregoing DOER's Review and Comments of an RFR. If a governmental body chooses to forego DOER's review of and comments on an RFR, the governmental body shall indicate said decision to the Commissioner of DOER in the governmental body's RFR Compliance Certificate, which is included in a complete Notice of EMS Procurement. In such cases, the governmental body shall file the Notice of EMS Procurement, including the RFR Compliance Certificate, at least seven days before publishing the RFR. DOER shall continue to have the right to investigate any apparent non-compliance with 225 CMR 10.00, in accordance with the provisions of 225 CMR 10.08.

(7) Publication of RFR. A governmental body may only publish an RFR for EMS procured in compliance with 225 CMR 10.03(3). Such publication of an RFR shall comply with the requirements of M.G.L. c. 149, § 44J(1). Governmental bodies are encouraged to provide longer than required posting and publication periods, when appropriate, to increase fair competition among bidders.

(8) Response Evaluation. A governmental body shall open and evaluate proposals by a governmental body pursuant to the procedures established by M.G.L. c.25A, §11C.

10.04: Contract Award

A governmental body shall award a contract for EMS procured under 225 CMR 10.00 in accordance with the provisions of M.G.L. c.25A, §11C. Within 30 business days after the contract is signed, the governmental body shall file a copy of said contract with the Commissioner of DOER.

10.05: Contract Terms

A governmental body shall include the following provisions in all contracts awarded by a governmental body pursuant to 225 CMR 10.00, in addition to other terms required by law and by the governmental body:

- (1) a description of required energy conservation measures to be performed by the contractor, including the cost of each measure, energy cost savings, and the method to be used to verify said savings;
- (2) the payment terms;

10.05 continued

- (3) the mechanism to be used to secure any guaranteed energy and water cost savings, particularly if the contract includes leasing of equipment which the governmental body intends to fund through cost savings; and
- (4) a detailed description of all services to be provided by the contractor, including but not limited to, operation and maintenance services.

10.06: Contract Amendments

A contract may be amended, so long as the amendment does not increase the total project cost by 10%, and so long as the contract term does not exceed the requirements established in M.G.L. c.25A, §11C. The governmental body must file a copy of a contract amendment with the Commissioner of DOER on or before 30 days after the effective date of the applicable contract amendment.

10.07: Monitoring; Reporting Requirements

For the duration of the contract term, the governmental body shall annually file with DOER a report containing the following information:

- (1) a summary of energy and, if applicable, water cost savings for the previous 12 month period, the methodology used for calculating said savings, and a description of conservation measures installed to date;
- (2) the cost of each conservation measure, the total project price, as of the time of each annual filing with DOER; which shall at a minimum itemize principal and interest payments, the value of any rebates provided by a utility, any direct government subsidy payments, and any tax or other incentives provided; and
- (3) the name, telephone number and address of the governmental body official responsible for overseeing the EMS contract;

A governmental body shall file the information described in 225 CMR 10.07 annually with the Commissioner of DOER beginning on the first anniversary of the effective date of the contract, and every year thereafter on the same date, ending with a final report on or before six months after the contract termination date.

10.08: Complaint Processing Procedures; Disputes

DOER shall investigate any complaints of a governmental body's non-compliance with M.G.L. c.25A, §11C and 225 CMR 10.00 subject to the following procedures and requirements:

- (1) Any person may file with DOER a complaint of non-compliance with the requirements of M.G.L. c.25A, §11C and 225 CMR 10.00. The complaint shall be in writing, mailed to the Commissioner of DOER and the relevant governmental body, certified mail return receipt requested, and shall include the following information:
 - (a) the name, address and phone number of the person filing the complaint;
 - (b) the name of the governmental body about whom the complaint is filed;

10.08 continued

- (c) a detailed description of the nature of the alleged non-compliance, including but not limited to, all applicable dates, the applicable statutory and regulatory requirement(s) allegedly violated, and names of any other persons involved in and aggrieved by the non-compliance;
 - (d) a statement demonstrating that the complaint has been brought to the attention of the governmental body and describing all previous efforts to resolve or correct the non-compliance with the governmental body; and
 - (e) any supporting documentation.
- (2) Upon receiving a written complaint which complies with the requirements established in 225 CMR 10.08(1), DOER, in its sole discretion, shall determine whether it has jurisdiction and whether the complaint is reasonable, and merits further investigation. If its finding is affirmative, DOER:
 - (a) may contact the person filing the complaint to request additional information;
 - (b) shall contact the relevant governmental body and provide the governmental body with an opportunity to respond to the complaint;
 - (c) may request information, including existing documentation and verbal or written explanations, from the governmental body regarding the complaint; and
 - (c) may contact other persons, including bidders and the selected contractor, to seek additional information regarding the complaint.
- (3) All persons, including but not limited to bidders, governmental bodies, and contractors, involved in the EMS procurement which is the subject of a complaint under investigation by DOER, shall comply fully with any such investigation and provide such information as DOER may require.
- (4) When DOER has gathered all the facts and information it deems necessary to evaluate the complaint, it shall render an advisory opinion to the person filing the complaint and to the governmental body about whom the complaint was filed, which shall explain, based upon DOER's findings, whether the governmental body violated any provision or requirement of M.G.L. c.25A, §11C or 225 CMR 10.00.
- (5) If DOER determines that a governmental body violated any provision or requirement of M.G.L. c.25A, §11C or 225 CMR 10.00, DOER may:
 - (a) include in its advisory opinion a recommendation that the governmental body take specific action to correct or remedy the non-compliance;
 - (b) forward its advisory opinion to the Office of the Inspector General and the Office of the Attorney General, requesting further investigation.Upon receiving DOER's advisory opinion, the parties to the complaint may request a DOER hearing to review DOER's findings in its advisory opinion. Such request must be in writing, delivered to the Commissioner of DOER by certified mail return receipt requested, and postmarked no later than 15 calendar days from the date of DOER's advisory opinion.
- (6) In the event that DOER determines a hearing is reasonable and necessary to address any non-compliance issues, DOER shall schedule the hearing at the earliest possible time and provide timely notice of the hearing and an opportunity to participate to all persons who have a substantial interest in the outcome of the proceeding.

10.08 continued

Within 14 days of said hearing, DOER shall issue an appropriate order which may require that the governmental body take any action necessary to comply with the provisions of M.G.L. c.

25 A, § 11C and 225 CMR 10.00 or terminate any action which violates the provisions of said statute or regulation.

(7) DOER reserves the right to refer any complaint to the Superior Court of Suffolk County.

(8) DOER may, upon its own initiative, investigate any apparent non-compliance with the provisions of M.G.L. c.25A, §11C and 225 CMR 10.00 and take further action consistent with procedures established in 225 CMR 10.08.

(9) In the event that a governmental body and a contractor or bidder are unable to resolve a dispute, which involves the application or interpretation of 225 CMR 10.00, the governmental body may, after making a good faith effort to resolve the dispute, seek assistance from the Commissioner of the DOER to assist in the resolution of the dispute or to provide a determination as to the application or interpretation of 225 CMR 10.00.

10.09: Severability

If any provision of 225 CMR 10.00 is declared or found to be illegal, unenforceable or void, public agencies shall be relieved of all obligations under that provision only, and all other provisions shall remain in full force and effect.

10.10: Waivers

(1) The Commissioner of DOER may grant a waiver from one or more provisions or requirements of 225 CMR 10.00 upon written request of a public agency and a showing of special or exceptional circumstances or need, provided that such written request shall at a minimum contain the following:

- (a) the waiver request must be in writing, signed by the public agency and specify the provisions of 225 CMR 10.00 to be waived;
- (b) the written waiver request must be mailed to the Commissioner by certified mail, return receipt requested;
- (c) the waiver request must provide a detailed explanation of why the waiver should be granted, including all documentation supporting the special circumstances and need for such waiver; and
- (d) the waiver request must include certification that the public agency has made a good faith effort to comply with the applicable requirements of 225 CMR 10.00.

(2) Any waiver granted by the Commissioner of DOER shall not relieve the public agency from any responsibility or obligation to comply with the other provisions of 225 CMR 10.00 or any other requirement of the law.

REGULATORY AUTHORITY

225 CMR 10.00: M.G.L. c.25A, §11C.